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...r appointment, such board of public utilities ...ne of its members as chairman, one as ...r of its members, or the city clerk, as ...m of one year. Such chairman, or in his ... shall preside at the meetings of the board. ...ence, an acting secretary elected by the ...tings and keep a record of all actions taken ... shall perform such other duties as the said ... specify. All records of the said board are ...iblic records, and any person shall, at ... such reasonable regulations as the board ...l to examine the records. Five members of ...quorum for the transaction of business. All ...d shall serve without any compensation ...ses of their office; the expenses thereof to ...f the utilities operated by the said board. If ... council to give bond, the cost of the same ...nue of the utilities operated by such board.

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...bers of the said board shall belong to the ... administration of such board shall be in all ...an. No member of the said board shall, ...eon, be a candidate for office, nor shall he ... school board, city, county, state, or federal ... or shall he be a member of any party ... to further the candidacy of any person for ...n becoming a candidate for public office or ...s aforesaid, during the term, he shall be ...mediately resigned as a member of the said ... shall be thereby ipso facto vacated.

...shall be prohibited for a period of one (1) ...year, ... from the board from being hired as an ...employee of the board.

Approved by the vote of the people April 4, 1989.

Section 16.6. Duties

Such board of public utilities shall have the power and it shall be its duty to take charge of and exercise control over any public utilities now owned or operated by or hereafter acquired by the City and all extensions thereof and the appurtenances thereto belonging (and with the right and power to establish, maintain and operate such park and recreation areas and facilities in the manner and as the board may determine, subject to approval of city council, upon real estate and properties acquired or held in connection with utilities as a part of said utilities operations), inside or outside the corporate limits of the City, and shall enforce the performance of all contracts and work, and have charge and custody of all the property, assets, books, and records belonging to such utility or utilities; provided, that nothing herein shall be construed to authorize a sale of said utility properties without a vote of the electorate of said city as provided herein; but said board may provide for the sale or other disposition of any useless, outworn, obsolete, or surplus supplies, equipment, or real estate not then useful in the operation of such utilities, in the manner provided by ordinances for the disposition of such property by the City.

Approved by vote of the people May 15, 1956.

Section 16.7. Powers

The said board of directors shall have all the powers necessary, desirable, or convenient to manage, control, and operate such public utilities, and by way of description but not of limitation, the board shall have the power to hire such persons in the manner herein provided as are necessary to operate the said utilities to agree upon or provide for the terms of their compensation to discharge the same, to purchase operating supplies and equipment, to provide for the extension and improvement of the property, to enter into contracts with other public and private utilities for the purchase of their product or the sale thereto, and do all things needful for the successful operation of said utilities except as hereinafter limited.

Section 16.8. Budget provision

Not less than 30 days prior to the end of the fiscal year of such utilities as determined by the said board, the said board of public utilities shall prepare and submit to the council a budget showing its estimated revenue for the coming year from all sources and its estimated expenditures for operating expenses, for depreciation, for payment of all outstanding obligations, for transfer to the City of payments in lieu of taxes, and all other estimated expenditures. Such budget shall be prepared in the form and manner required by the director of finance, and the same shall conform to the accounting system in use. Said budget shall be filed with the city clerk and shall remain on file for a period of not less than two weeks before any action is taken thereon. Said budget shall be a public document, and any person shall have the right to inspect the same at the office of the city clerk. Not less than two weeks after the said budget is presented, the council shall consider the same and may, on its own motion, hold a public hearing upon the said budget as presented, or it may reduce items of expenditures or delete items of expenditures, but it shall have no power to increase the estimated revenues nor may it increase any item of expenditures nor may it strike out or reduce any salary of any individual from the said budget. If the council shall take no action on the said budget within 30 days from the date the same is presented, the budget shall be deemed approved and shall become effective without further action.

Thereafter, no changes may be made in the said budget without presenting the same to the council and with the approval of the council after a lapse of two weeks and a public hearing thereon if desired; provided, however that items of expenditure as approved may be, if necessary, shifted from one class of item to another, without presentation to the council, but upon approval by the board of public utilities and upon certification by its manager that such changes are necessary.

Section 16.9 Disbursements

The approval of the said budget by the council shall be deemed to be an appropriation of the money authorized for disbursement thereby, and no further action need be taken by the council. All moneys paid by the said public utilities shall be paid by the comptroller thereof in accordance with procedures established by the board for verification of expenditures when the comptroller of city utilities certifies the payment

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to be within the terms of the moneys appropriated by the budget for the purposes specified in the budget.

Approved by vote of the people April 3, 1984.

Section 16.10 Funds

All moneys due to and collected by the public utilities from any source shall be paid to the comptroller of such utilities and deposited by him daily in the City depository to the credit of such public utilities and shall be disbursed by him only in accordance with the provisions of this Article or of any ordinance now in effect or hereafter enacted relating to the bonded debt of such public utilities.

The said comptroller shall be appointed in such manner as the board of public utilities shall direct and shall give bond to the board of public utilities and to the City jointly in such sums and on such conditions as the council shall by ordinance provide, the cost of said bond to be paid out of the revenue of the public utilities operated by the board.

Section 16.11. Accounting

The said board of public utilities shall follow in all respects the accounting procedures established for private utilities by the Public Service Commission of Missouri or by the Federal Power Commission. It shall furnish or cause to be furnished to the said city or to its director of finance such record of all cash deposited by it and a monthly record of all receipts and disbursements in such form and in such detail as shall be required by any ordinance hereinafter enacted by the council, which records shall at any time be open to the examination of the council or any committee or representative appointed by the council, and such board shall make, not less frequently that quarterly, full and complete reports of its transactions to the council; and it shall be the duty of the council at such times as it may deem expedient and necessary, but not less than one each year, to make or cause to be made a complete audit of the operations of said board for the preceding year.

Section 16.12. Purchases and contracts

The city utilities may purchase independently, except as provided further in this Section, but before it makes any purchases or contracts, or lets any contract for improvements, there shall be given ample opportunity for competitive bidding, in accordance with such rules and regulations as the board of public utilities upon recommendation of the

general manager approved by the city council, may prescribe by resolution, provided, however, that the board of public utilities shall not except individual contracts, purchases or sales from requirement of competitive bidding, nor shall it permit the subdivision of contracts or purchases for the purpose of evading the requirements of competitive bidding.

It is hereby declared to be the public policy of the city that supplies and equipment ordinarily used by the city utilities, operated by the board, and by other departments or agencies of the city, shall be purchased in such manner as to take advantage of the combined purchasing power of the City as a whole, wherever practicable.

The city manager and the general manager of the city utilities, together with such administrative staff as they deem necessary, shall meet at least quarterly to study and apply combined purchasing and any other activities that might be beneficial to the City as a whole.

Section 16.13. Rate making provisions

The said board shall fix the rates to be charged for services and facilities furnished by such public utilities, subject to the approval of the council. Such rates shall be submitted to the council, and no action shall be taken thereon for a period of at least two weeks. The schedule of proposed rates or changes therein shall be filed with the city clerk and shall be a public record open to the inspection of any person. During such period the council may, on its own motion, hold a public hearing on such schedule of rates or proposed charges thereon and may adjourn such hearing from time to time. At the conclusion of such hearing the council shall approve or reject such schedule of rates or proposed changes therein.

Both the board and the council may take into consideration the health and welfare of the inhabitants of the community in establishing the rate structure.

Approved by vote of the people August 8, 1978.

Section 16.14. Employees of public utilities

The said board shall appoint and may remove the manager; who may, with the approval of the board, appoint and remove his assistants and the heads of departments; all other employees shall be hired, promoted, reduced or discharged in accordance with rules established

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by the board designed to secure and retain employees strictly on the basis of their merit and without regard to favoritism. The board shall determine the duties and compensation of all employees. No individual member of the said board shall request or recommend the employment, retention, promotion, reduction, retardation, or discharge of any employee and such request or recommendation shall be sufficient cause for removal of such board member from office.

Section 16.15. Payment into city treasury and services furnished

The board of public utilities shall pay into the general revenue fund of the City each month, three percent of the gross operating revenue of any electric light or power plant or distribution system now or hereafter owned or operated by the City, and four percent of the gross operating revenues of any gas works or bus transportation system now or hereafter owned by the City, which said payments shall be in lieu of taxes. No change in such payments shall be made without being first submitted to a vote of the qualified voters of said city at a regular or special election held for that purpose and approved by a majority of the votes cast in such election. In addition to such payments, the public utilities shall continue to furnish without charge adequate lighting for all streets, alleys or public ways deemed necessary by the council to be lighted and may, without charge, at the request of the council, furnish electricity, gas and heat to all City-owned buildings and grounds as needed, on the same conditions (other than payment) under which such services are available to private users.

Section 16.16. Disposition of net income

The board of public utilities and council shall have joint authority and control over the reserves and funds of such utilities as are not required to pay the usual and proper costs of operation, depreciation, payments in lieu of taxes, maintenance, additions, extensions and repairs of such utilities. Such fund shall be administered and applied in such manner as may be recommended by the board of public utilities and approved by the council, subject, however, to the provisions of City ordinances now existing, or which hereafter may be passed by the council relating or in connection with any bonded debt of such public utility. Should the council fail to approve the recommendation of the board of public utilities as to the disposition of such funds, then the council and board of public utilities in joint session may, by two-thirds favorable vote, designate the use of any part of, or all of such funds for any or all of the following purposes: reserve for emergencies; addition to or extension and improvement of facilities in accordance with projected plans; the

improvement or service in any department of such public utility, regardless of the return therefrom; or a reduction in rates; but in no case shall any part of this fund be transferred to the general revenue fund of the City. The board of public utilities shall make its report on the previous year operations and its recommendation concerning use of such funds to the city council within thirty days after receipt of the annual director of finance's report.

Section 16.17. Sale of public utilities

Before the City shall sell or dispose of, in any way, or abandon or cease to operate any public utility which may be owned by it, it shall firs submit the proposition for such sale or disposition or abandonment o ceasing to operate, by ordinance, to the qualified voters of said city either at a general election or a special election, held for that purpose and it shall require a majority of the votes cast at said election for and against such proposition, to be in favor of the proposition before any authority shall exist for such sale, disposition, abandonment, or ceasing to operate.

Section 16.18. Condemnation

The board of public utilities shall have the right of eminent domain t the same extent and to be exercised in the name of the City in the sam manner as is now or may hereafter be granted by the statutes o Missouri to any privately owned utility.

Section 16.19. Area of service

The board of public utilities shall operate the utilities and furnish th services thereof within the corporate limits and within the area outsid of such corporate limits in any county in which the City is located.

Nothing in this section shall be construed to prevent said board fro purchasing, leasing, erecting, installing, or otherwise acquiring real an personal property necessary, useful or desirable in the conduct of it operations at any place whether within or without the corporate limits the City.

Approved by vote of the people November 5, 199

ATTACHMENT R

COMMITTEE PRINT

S. PRT. 105-25
Part 1

COMPETITIVE CHANGE IN THE ELECTRIC POWER INDUSTRY

PRINTED AT THE REQUEST OF THE

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UNITED STATES SENATE

MAY 1997

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II. WHAT IS THE ROLE OF PUBLIC POWER IN A COMPETITIVE ENVIRONMENT?

THURSDAY, MARCH 13, 1997

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:42 a.m. in room SD–G50, Dirksen Senate Office Building, Hon. Frank Murkowski, chairman, presiding.

OPENING STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM ALASKA

The CHAIRMAN. We will call the workshop to order.

I apologize, ladies and gentlemen—we have one lady with us, I see—for delaying this process. Hopefully you have had an opportunity to observe the process of democracy in action. Some say it is like making sausage and they would rather not watch it, but you just saw it.

So let me turn now to our original purpose for the assembly here. I first would note that this used to be the—well, this used to be the Senate intelligence room, if there is any significance to that, and what we are going to get for the record, well, I will leave that to the participants. But today we are focusing on the roll of public power in a competitive market.

Now, I have no pride of authorship in the process at this point. Senator Bumpers has introduced a bill, so he obviously has that pride. I prefer this process of a workshop to develop input from the people who have to deal with providing this Nation with power, and I might add, unfortunately, your particular industry is probably more taken for granted than any other single industry that exists in this country, because it always works. The lights are always on. It is almost an entitlement like nothing else that I can think of.

Hopefully from this workshop process we can develop a procedure to go as far as we can in making some significant corrections, moving some of the Federal impediments that stand in your way, whether it be investor-owned or public power, provide more competition, and provide a reduction for the ratepayers through greater efficiency. That is if everything were in an ideal world.

So we work from a workshop, get your ideas, get your input, you tell us what you need to do to compete in a changing marketplace, and it is a changing marketplace.

Now, I have called on one of my colleagues, Senator Thomas, to chair this hearing, because he has special expertise. If you were

talking about credits and money and past-due loans, why, I probably have something to offer, but before Senator Thomas came to the Congress, Senator Thomas was the State-wide manager of the Wyoming Rural Electric Association. So sometimes it is dangerous to have one who knows a little bit more about your business than you might think. They say a little bit of knowledge is dangerous, Senator Thomas has a lot, I am not sure if that is good or bad, but that is going to be determined by the leading questions that he is going to ask you, and I know your competitors are right behind you picking up on every word.

Before I hand the gavel over, let me say a few things about the electric debate relative to public power. And I am sure that my presumptions, so to speak, you have some counters to them, but I think that there is a general assumption that public power has some advantages, whether it is the exemption from corporate income taxes or the ability to issue tax-free municipal bonds or access to low-cost Federal power marketed by the Federal PMA's. Some of that is not low cost anymore, not subject to utility regulations by State public utility commissioners and by the FERC, even. FERC's wholesale open access, Order No. 888, does not apply to transmission lines owned by public power. And cooperative utilities have access to low-cost Federal loans. You play a very major role in the production of power that is utilized in this country.

Private power, likewise, as you are going to point out to me, has a number of special advantages and provisions under the Federal tax code that are not available to public power, and those are legitimate questions, and we want to hear from you on those today.

The question facing the committee is not really are these special advantages good or bad. Instead, the question facing the committee is how can we create an environment where there is fair competition between public and private power? I guess perhaps even more troublesome is that some Federal utilities are now interested in using their advantages, if they are assumed to be advantages, to compete aggressively against private investor-owned power. That is both good and bad, depending on your definition of what is good and bad. TVA has asked, as I understand it, to be allowed to go outside its so-called fence, for reasons, very good reasons, undoubtedly. Bonneville Power asked for and was recently given authority to sell its Federal power outside the Northwest in competition against independent power producers and private utilities.

Now, whether or not there is Federal competition legislation, I am concerned about having the Federal Government go into competition against private industry. That is just a basic philosophy of mine. That is the bottom line.

We have before us a distinguished panel of witnesses who will educate us on these difficult issues and give us their solutions. I know some of the members cannot be here, but they will be in and out, and I know their staffs are very attentive. I would like to have you answer out of this, if you will, Senator Thomas, a bottom-line question that I have, and that is can we have deregulation where public power and investor-owned power utilities compete on a level playing field. I would hope that that would be one of the questions that we could get your opinions on, and as you know, the lights are on. The other alternative to the lights being on is the lights are off.

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[illegible]or THOMAS. Yes, I am today.
[illegible]HAIRMAN. At least until 1. So I am going to sit over here
[illegible]on, and I am going to ask you to come sit next to Senator
[illegible]ers. And you will have as many cushions as he does. I see
[illegible] Senator Ford's cushion. We each have two now, if you
[illegible] to grab another one.
[illegible]ator BUMPERS. No, this is fine.
[illegible]HAIRMAN. All right. You will be king of the mountain.

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS [presiding]. Thank you all for coming. I am sorry we are getting started so late. Thank you, Senator Murkowski. This is the second in a series of workshops designed to talk about how we ensure fair competition in the electric utility industry. And certainly, we all agree there will be some change. The question is how much. Obviously, there are different views.

There are some who think all monopolies are outdated and we ought to get rid of them and move on to whatever happens, there are those who do not want change at all, and there are those who accept, and I think properly, the fact that there are going to be changes and we should make an effort to ensure that all customers benefit from that, as well as investors and others.

One of the major issues is the role of the Federal Government versus the role of State government. You all know that the States are moving. We are here to talk about the role of member-owned and nonprofit utilities, as well as public power. There is a difference between the two.

We have talked about some of the guiding principles. Who is going to benefit from competition; what do we do, and who pays for stranded costs; will everyone be served; what are we going to do with low-density areas, will there be a great deal of attention to serve there; will competition focus entirely on large businesses?

I come from a small State. We have had some experience in deregulating the airlines and telecommunications industries where it has not been very beneficial. It is cheaper to fly from Denver, Colorado to Washington, DC than it is from Casper, Wyoming to Denver, Colorado. These are the kinds of things we have to examine, and the committee is delighted to have you here.

Let me call on the ranking member, Senator Bumpers.

STATEMENT OF HON. DALE BUMPERS, U.S. SENATOR FROM ARKANSAS

Senator BUMPERS. Mr. Chairman, the chairman of this committee raised a very important question a moment ago, and that is: can we have investor-owned utilities and municipal and cooperative utilities who have had considerable favorable treatment by the Government compete on a level playing field? And while there are

many issues involving Government-generated power or power generated by those who have close relationships with the Government such as the PMA's, the question really is should they be included, should they not be included, and a whole host of other related subjects.

Today's topic is what is the role of public power in a competitive environment. There are more than 2,000 municipal electric utilities and nearly 1,000 rural electric cooperatives operating in the United States. They sell more than 25 percent of all the electricity consumed in this country. And we want to examine the impact that retail electric competition will have on the vital functions that public power serves.

Almost every member of this committee, if not all of them, represent States with substantial rural populations. It is difficult to imagine where rural America would be had it not been for the rural electric administration and the rural electric coops. I have probably made more speeches to rural coops than any other group in my 26 years in public office. And I do not think I have ever missed an opportunity to say that I have been a great champion of public power.

There was a time when I tried to get every dam on the Arkansas River generating power. But of course, back in those days there were a lot of people that had never given up on the fact that TVA was a communist conspiracy. So it was very difficult to talk sense back then. And it was only after the Arab oil embargo that people began to talk sense about that.

But the main point I made in all those speeches was that my father, who was a small-town merchant, saved his business, he was able to sell refrigerators and radios and other electrical appliances to rural people who had never had that opportunity. So in addition to all of these, for many years the municipal utilities provided the only competition available in an industry dominated by the monopolies.

I have always considered myself as a supporter of public power, and I have never apologized for it. My legislation, the Electric Consumers Protection Act of 1997, subjects all utilities, including muni's and coops, to retail competition no later than December 15, 2003. I have heard from a number of publicly owned utilities, including some in my State, that would prefer the option of choosing not to be subject to competition in exchange for not being able to sell power outside their current service territories. Several States have adopted this position in their restructuring bills. This is a proposal that deserves consideration by this committee, although I am troubled about the prospect of segmenting electrical markets, where some customers have choice and others do not.

Mr. Chairman, I know it may be tempting for some to raise the specter of selling the power marketing administrations, and it is every Senator's prerogative to raise any issue they want. But I must say I am troubled that some utilities argued they should be compensated for their stranded costs, a concept with which I disagree because of the so-called regulatory compact. Some of these same utilities object to the compact the Federal Government entered into with municipalities and cooperative utilities to pay for the cost of Federal water projects such as PMA's in exchange for

dro power. I am sure these utilities do not want us to abrogate ese solemn contracts.

Mr. Chairman, I thank you for this opportunity.

Senator THOMAS. Thank you very much. I hope members will mit their comments, and submit any statements, if you have nem, so we can move on.

Senator Nickles.

Senator NICKLES. I will pass.

Senator THOMAS. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Let me associate myself with the comments of Senator Bumpers. I am an unabashed supporter of public power, the rural electric coops, and I am anxious to hear these discussions.

Senator THOMAS. Senator Gorton.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Thank you, Mr. Chairman. I welcome this panel, and particularly a representative from my own State, the questions that come from that part of the country that benefits from vigorous competition between publicly and privately owned utilities and relatively low rates. Its interest in this process is high, and our fundamental questions are to what degree can a new and different and competitive market benefit our ratepayers as well as those in other parts of the country.

We, of course, have our very special concerns with respect to the Bonneville Power Administration. We are unfortunately still faced with the shibboleth or the ghost of the idea that somehow or another the Bonneville Power Administration can be sold. When I look at the huge debts that it has, both in connection with failed nuclear plants and its own plant, together with the fish costs we are imposing on it, my own impression is that if it were to be sold with all of those debts it would have a negative net worth, or very close to that. And, of course, its responsibilities extend far beyond power, to fish, to flood control, to transportation, to irrigation and the like.

So I hope that even here our witnesses will observe the fact that there is a very significant Northwest representation on the committee. Talk to issues that may be likely to happen, and not to those that will not.

Senator THOMAS. Thank you, Senator.

Any further comments?

STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Senator JOHNSON. Yes. Mr. Chairman, I will submit a full statement for the record, and I will be very brief. I want to thank you for chairing this workshop this morning. I will not be able to stay through the workshop, but I do appreciate the presentation. My staff will be here, and I think the contribution will be very constructive this morning.

I am hopeful that today's presenters will focus on the role of public power in the electricity restructuring debate, and not on past battles such as the need for sale of the PMA's. Further, I am assuming that any discussion of leveling the playing field will include a thorough review of all of the programs from which different utilities benefit, any unique regulatory treatment for certain types of utilities, and each of the financing options available to utilities for various needs.

I share in my colleagues comments that rural electric coops will continue to be an important factor in the economic development of their communities, and in many cases they are in fact the best equipped to work to ensure small communities remain viable and continue to keep medical facilities, schools, and other services available. I am convinced that the importance of rural electric coops will continue to grow.

In general, I am concerned about adverse impacts on rural America by major changes in the delivery of electricity, especially if those changes occur too quickly and before the long-term impacts have been fully analyzed. What sound good in theory may not work in the real world, especially in rural America, where the delivery of electricity to everyone is sometimes challenging, but absolutely critical to providing the quality of life that all Americans expect and deserve.

Our experiences in rural America with the deregulation of other industries, such as the airline industry and most recently the telecommunications industry, have made South Dakotans understandably somewhat skeptical about the perceived benefits of restructuring or deregulation of any major industry on which we depend. During consideration of any legislation designed to restructure or deregulate the electric utility industry, I will be guided by the principles of whether this is, in fact, in the best interests of rural America. And this certainly focuses my attention on ensuring that a solid public power system remains in place.

And I thank you, Mr. Chairman.

[The prepared statement of Senator Johnson follows:]

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Thank you, Mr. Chairman. While I will not be able to stay to participate in the entire workshop this morning, I appreciate the opportunity to listen to some of today's presentations. I am optimistic that this workshop will help educate members of this committee and all participants in this discussion about the critically important role and necessity of our current public power system.

Additionally, I am hopeful that today's presenters will focus on the role of public power in the electricity restructuring debate and not on past battles fought such as the need for the sale of the PMAs. Further, I assume that any discussion of "leveling the playing field" will include a thorough review of all of the programs from which different utilities benefit, any unique regulatory treatment for certain types of utilities, and each of the financing options available to utilities for various needs.

I strongly support the rural electric program and have actively worked to oppose various efforts in recent years to eliminate or radically redesign this nation's commitment to public power. I plan to continue those efforts during any deliberations or action concerning the restructuring of the electric power industry. If this debate is truly about "choice," we must preserve the ability of consumers to choose to be served by public power systems.

Rural electric cooperatives will continue to be an important factor in the economic development of their communities and, in many cases, they are the best equipped to work to ensure small communities remain viable and continue to keep medical

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Thank you, Mr. Chairman.

Senator THOMAS. Senator Landrieu.

STATEMENT OF HON. MARY L. LANDRIEU, U.S. SENATOR FROM LOUISIANA

Senator LANDRIEU. Mr. Chairman, in light of the short time and the excellent panel we have, I am just going to submit my comments to the record and thank you for your patience this morning.
[The prepared statement of Senator Landrieu follows:]

PREPARED STATEMENT OF HON. MARY L. LANDRIEU, U.S. SENATOR FROM LOUISIANA

I would like to thank the Chairman for having this workshop today on the role of public power in a competitive market.

As a newcomer to the Senate and to the Energy Committee, I have had the serendipity to embark upon my journey, my maiden voyage if you will, with two complex and revolutionary issues: Electric Restructuring and the Nuclear Waste Debate. Some might say these are unenviable tasks for a new member, but both hold enormous meaning for the American consumer. The one I have heard the most from constituents on, and will for some time I'm sure, is electricity deregulation and competition.

Throughout the debate on restructuring and competition, a single mantra has emerged as the guiding principle on this issue: consumers should have access to the lowest priced electricity available. To do this, we must lessen the burden on producers. But in order to get there, we have a long journey ahead—a lot of concerns to address, some that we probably aren't even aware of yet. Those we are familiar with pose significant questions.

First, take the current situation. States like California, Rhode Island and Pennsylvania have already taken the giant step towards competition on their own terms. Others like New Hampshire and Michigan are in the midst of litigation over the issue. Soon there will be a patchwork of state schemes. Without commenting on how or if we should impose a Federal framework, I can tell you this is something that must be looked at extremely closely in any legislation we consider, especially as we attempt to heed the calls for a level playing field.

Second, there is the issue of cost recovery. The Federal government's policies over the years have encouraged many utilities to make enormous investments in electricity generation facilities. Although the debate rages over whether taxpayers should help deal with stranded costs, it cannot be denied that this is an issue we must deal with effectively to prevent a bankrupt industry.

Then you have questions about the reliability of supply in a competitive market. Louisiana has 12 electric cooperatives that serve over 320,000 homes and businesses in 55 of the state's 64 parishes. The vast majority of these consumers are residential and small business owners. My constituents in Louisiana have contacted me in large numbers relating concerns about reliability in a competitive market and about customer protections in general. They have also contacted me about how changes in electricity prices can have a profoundly positive effect on the economy. No one here knows more how important this can be to a state like Louisiana.

In closing, I state for the record that I am in favor of competition. Competition is a time honored tradition in this country. We have made it work for natural gas,

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JUL - 8 1998

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
The Missouri Municipal League;	
The Missouri Association of Municipal Utilities;	
City Utilities of Springfield;	
City of Columbia Water & Light;	
City of Sikeston Board of Utilities.	
Petition for Preemption of	
Section 392.410(7) of the	
Revised Statutes of Missouri	

98-122

Docket No. 98-122

PETITION FOR PREEMPTION

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July 8, 1998

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To the Commission:

PETITION FOR PREEMPTION

Pursuant to Section 253 of the Telecommunication Act of 1996, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities (collectively "the Missouri Municipals") petition the Commission for an order preempting Section 392.410(7) of the Revised Statutes of Missouri ("HB 620"). The Missouri Municipals file this petition on behalf of more than 600 municipalities and 63 municipal electric utilities located throughout the State of Missouri.

HB 620 violates Section 253(a) of the Act because, with limited exceptions, it prohibits Missouri municipalities and municipal electric utilities from providing telecommunications services or making telecommunications infrastructure available to potential competitors of incumbent providers of telecommunications services. The Missouri legislature did not enact HB 620 to achieve any of the permissible public purposes set forth in Section 253(b) of the Act -- it simply succumbed to the vast lobbying effort that Southwestern Bell and other incumbents mounted to preserve their monopolies in local markets throughout the State. Section 253(d) therefore mandates that the Commission preempt HB 620.

OVERVIEW AND SUMMARY

As Chairman Kennard has observed, one of the main purposes of the Telecommunications Act is to eliminate all barriers that prevent consumers from choosing providers "from as wide a variety of providers as the market will bear."[1] Similarly, Senate Majority Leader Trent Lott has noted that the "primary objective" of the Telecommunications Act is to establish a "framework where everybody can compete everywhere in everything."[2] Judged by these standards, HB 620 is a thoroughly bad law. Unless the Commission preempts it, HB 620 will impede the development of effective local competition in Missouri for years. It will deny communities throughout the State a fair chance to obtain prompt and affordable access to the benefits of the Information Age. It will constrict economic growth, educational opportunity and quality of life, particularly in rural areas. It will thwart attainment of universal service goals of the Telecommunication Act by reducing both the number of potential service providers and the number of contributors to universal service support mechanisms. It will also disturb the competitive balance between public and private providers of electric power that has served Missouri well for decades.

The Missouri Municipals recognize that the Commission has declined to preempt a Texas law that prohibits municipalities and municipal electric utilities in Texas from engaging in telecommunications activities.[3] In that case, which was decided shortly before four of the five current commissioners took office, the prior Commission determined that the term "any entity" in Section 253(a) of the Act does not apply to municipalities that do not operate electric utilities.

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1 *Statement of William E. Kennard Before the Senate Subcommittee on Antitrust, Business Rights, and Competition* (March 4, 1998), Attachment A.

2 Statement of Senator Trent Lott (R-MS), June 7, 1995, Congressional Record at S.7906, Attachment B.

3 *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), petition for review pending in *City of Abilene, TX, and the American Public Power Association v. Federal Communications Comm'n*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

That ruling, however, did not address the major issues discussed here, did not consider several important new developments, and did not properly analyze congressional intent.

The Texas case involved four separate dockets, numerous complex issues in addition to the municipal-authority issue, an extraordinarily large number of parties, and a massive record. Shortly before the Commission issued its decision, ICG Telecom, Inc., which had sought preemption of the Texas law as applied to municipal electric utilities, withdrew its petition. In response, the Commission limited its decision to the facts presented in a separate petition by the City of Abilene, TX, which does not own or operate a municipal electric utility. Specifically, the Commission ruled that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, ¶ 179. This proceeding squarely presents that issue.

Even as to municipalities that do not own or operate electric utilities, the *Texas Order* did not address the issues that the Commission had itself identified as the most important ones. According to the Commission, the key issue in determining whether the term "any entity" in Section 253(a) applies to municipalities is whether there is "some indication in the statute or its legislative history that Congress intended such a result." *Texas Order*, ¶ 187, *see also* ¶ 181. Yet, the Commission did not present any substantive analysis of the language, structure or legislative history of the Act. Nor did the Commission even mention the correspondence that it had received from prominent members of Congress confirming that the term "any entity" covered municipalities and municipal electric utilities.

Because much of the relevant legislative history of Section 253 pertains to municipal electric utilities, it is possible that the Commission believed that its decision to defer consideration of their status obviated the need for a thorough review of that history. Whatever the reason, the Commission's failure to perform the required analysis led it to overlook the compelling proof, discussed below, that Congress did, indeed, intend that Section 253 cover all municipalities, including those that do not operate electric utilities. The Commission would even have found

express statements to that effect in the Senate report discussing the preemption provision that ultimately became Section 253(a).

Several new developments reinforce the conclusion that the *Texas Order* was incorrect. First, the United States Court of Appeals for the District Columbia Circuit has recently issued two decisions that undermine the Commission's rationale in the *Texas Order*. In *Alarm Industry Communications Committee v. Federal Communications Comm'n*, 131 F.3d 1066, 1069-70 (D.C. Cir. 1997), the court struck down the Commission's narrow interpretation of the term "entity" in Section 275 of the Act, finding that "entity" is typically defined very broadly in common, non-technical dictionaries and that the Commission failed to interpret that term with due regard for the Act's underlying policies. The court also refused to afford the Commission's interpretation deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Id.* Similar considerations apply here.

Second, in *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C. Cir. 1997), the court found that, in determining the "plain" meaning of a statute, the Commission must perform a thorough analysis that exhausts all of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the Act. *Id.* at 1047. The Commission cannot simply scan the Act and its legislative history in search of an "express" statement of legislative intent, as the Commission has recently admitted that it did in deciding the *Texas* case.[4]

The Commission has itself made numerous statements in recent months that are inconsistent with the *Texas Order*. For example, in one order, the Commission held that Congress's use of the term "any" in the Telecommunications Act deprives the Commission of

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[4] In a recent letter to Congress, Chairman William Kennard, who was general counsel of the Commission at the time that it issued the *Texas Order*, confirmed that the Commission had looked for an "express" statement of legislative intent (Attachment C hereto).

authority to make distinctions that Congress did not make, that municipalities that provide telecommunications services or cable television services are "entities" whose pole attachments must be counted in allocating costs of a pole, and that municipalities are "entities" that must be covered in the Commission's regulatory flexibility analyses. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, FCC 98-20, ¶ 40 (rel. Feb. 6, 1998) ("*Pole Attachment Order*"). Similarly, in several recent orders, forms and reports, the Commission has treated municipalities and municipal electric utilities as "entities" that must make contributions to the Universal Service program if they, like privately-owned entities, provide "telecommunications service" or "interstate telecommunications."

Recent developments have also undermined the Commission's assumption that local competition would emerge in Texas even if municipalities were denied protection under Section 253. *Texas Opinion*, ¶ 187. As the Texas Public Utility Commission has just found, Southwestern Bell's uncooperative and obstructive conduct has prevented its competitors from capturing more than a "miniscule" number of business and residential customers in Texas. Transcript of Open Meeting, May 21, 1998, pp. 186-208 (Attachment D hereto). In fact, two of the three commissioners observed that meaningful competition will not emerge in Texas unless and until Southwestern Bell fundamentally changes its corporate culture from top to bottom. *Id.* It is unreasonable to suppose that Southwestern Bell will act any less anti-competitively in Missouri.

Furthermore, in ¶190 of the *Texas Order*, the Commission urged other states not to do what Texas had done because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." Unfortunately, the Commission's plea has gone unheeded. In fact, the Commission's determination that it lacks authority to prevent states from banning municipal telecommunications activities has emboldened incumbent monopolists in many states to redouble their efforts to secure anti-competitive state legislation that reinforces their existing market dominance. The Commission can deter such

efforts -- as Congress intended -- only by issuing clear, forceful and unequivocal orders preempting measures such as HB 620.

Finally, as the Commission recognized in the *Texas Order*, Congress gave it extraordinarily broad authority to preempt state and local barriers to entry:

> [S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service*. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of *any competitor or potential competitor* to compete in a fair and balanced legal and regulatory environment.

Texas Order, ¶ 22 (emphasis added). Yet, even though it could not find even one word in the language or legislative history of the Act to support its position, the Commission attributed to Congress an intent to deny public entities the benefits of this broad mandate. Thus, the Commission essentially made policy for Congress – which the Commission had no authority to do. The Commission should now rescind that decision and enforce Section 253 as written.

STATEMENT OF FACTS

I. THE HISTORY OF SECTION 253 OF THE TELECOMMUNICATIONS ACT

A. The 103rd Congress

To understand what the 104th Congress meant when it used the term "any entity" in Section 253(a), it is instructive to review the history of S.1822, the bill in the prior Congress in which the term "any entity" originated. In particular, it is helpful to view that term against the backdrop of the discussions that occurred at the time among members of Congress and

representatives of the American Public Power Association ("APPA") and UTC, The Telecommunications Association ("UTC").[5]

During the 103rd Congress, APPA and UTC urged Congress to do everything possible to encourage municipal and other forms of consumer-owned electric utilities[6] to participate actively in the development of what was then called the "National Information Infrastructure." APPA and UTC advised Congress that some of their members were willing to provide telecommunications services themselves and others were willing to make facilities available to potential competitors of incumbent providers, if doing so would not subject them to the requirements applicable to telecommunications carriers. APPA and UTC appealed to Congress to accommodate both groups. For example, in its testimony on S.1822, APPA stated,

> PUBLIC POWER'S INTEREST IN THE
> [NATIONAL INFORMATION INFRASTRUCTURE]
>
> While all electric utilities have telecommunications needs, the manner in which these needs are met differs greatly among public power systems. Some public power systems satisfy their communications requirements primarily by leasing capacity from third parties. Other APPA members rely on communications systems built only to satisfy their own needs. Still others have built communications systems using some capacity on those systems for their own internal needs and leasing excess capacity to others (acting as the owner of a conduit rather than a telecommunications or information service provider). Finally, some public power communities have built communications systems to serve their own needs and to provide other telecommunications and information services to community residents and businesses.

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5 APPA is the national service organization that represents the interests of the nation's more than 2,000 consumer-owned, not-for-profit electric utilities, including systems operated by municipalities, counties, states and public utility districts. UTC represents more than 1,000 publicly-owned and privately-owned utilities of all kinds in telecommunications matters.

6 For the purposes of this petition, the term "municipal electric utilities" includes all forms of publicly-owned electric utilities.